Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1992

CAREY F. SHARP, et al.
Plaintiffs-Appellants

v.

UNITED AIRLINES, INC., and
DOES 1 THROUGH 10,
Defendants-Appellees.

Consolidated with

NINA M. ABBOTT, et al.
Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC., a Delaware Corporation,
and JOHN DOES 1 through 25
Defendants-Appellees.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 11, 1992

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QUESTIONS PRESENTED FOR REVIEW

1. Whether persons have standing to sue for anti-competitive conduct which targets and/or affects them directly in the market in which they do business as suppliers.

2. Whether persons injured in their business and property by reason of federal and state anti-trust violations lack standing to sue because their employers were also injured.

3. Whether each Circuit can carve out different standards for anti-trust standing which are more limiting than those enunciated by the United States Supreme Court.

4. Whether the lower courts may summarily dismiss a Complaint under F.R.C.P. 12(b)(6) where the Complaint alleged all of the elements necessary to confer standing, and where factual inquiries were necessary to determine the standing issue.

5. Whether the lower courts may deprive persons of standing before an appropriate factual inquiry and a legal analysis have been completed and the persons have had a full opportunity to be heard and to present all evidence in support of their position.

PARTIES TO THE PROCEEDING

The Sharp Plaintiffs are CAREY F. SHARP, ROGER O. BROOKS, ROBERT L. WILLIAMS, BILL J. WATKINS, ROBERT W. VANCE, et al: JOSEPH D. ABELL, JEFF ABRAMS, JAMES M. ACTOR, DANEIL R. ADAIR, , MALCOLM C. AFUHR, JAMES H. ALLEN III, JIM D. APPLEBY, TERRY E. ARMBRISTER, B. A. ARNOT, DOUGLAS A. BADER, DANIEL A. BAKER, THOMAS A BANISTER, FORREST H. BAILEY, JR., JACK M. BAILEY, LAWSON E. BARCLAY, JOHN A. BATA, ROBERT G. BEABOUT, PATRICK J. BECKHAM, CHARLES E. BEVILLE, LOWELL K. BILSBOROUGH, ERIC L. BJORN, GARY G. BLANCHARD, GREGORY M. BOYER, WHITNEY A. BRANDON, RICHARD C. BRIGHT, DEAN ELTON BRISTOL, TEDDY E. BROCK, MICHAEL J. BRONOWSKI, MICHAEL F. BRUMFIELD, JAMES W. BURMAN, JOHN E. BURT, MICHAEL B. BURTON, DAN J. CADY, CHARLES T. CALKINS, JAMES W. CANNON, PAUL W. CAREY, VERNE W. CARLSON, CHARLES L. CARPENTER, LLOYD D. CARR, WALLACE E. CARROLL, FRED W. CHAPMAN, DOUG E. CHRISTENSEN, ROBERT H. CHURCHILL, SAM P. CLARK, NICOLAS S. CLINGER, KENNETH COGGESHALL, HOWARD COLLING, DAVID B. COMISH, JOHN F. CONNORS, EARNEST D. COOK, DENNIS M. COX, GARY L. CRAVEN, JON N. CROUCH, MICHAEL R. DACIEK, RICHARD P. DAKE, JOHN L. DAMERON, WILLIAM K. DENDY, GARY M. DeSPAIN, MELVIN D'LOSS, DONALD E. DONALDSON, JOHN A. DUNCAN, DENTON J. DYKES, NORMAN R. EDSON, DAN C. FARLIN, WALTER A. FELIZIANETTI, JOSEPH H. FERGUSON, DENFORD D. FINKE, RICHARD R. FISCHEL, HAROLD L. FLETCHER, ROBERT L. FOLKEN, JAMES E. FORD, RICHARD C. FORD, H. A. FROST, MYRON E. GADOW, RUSSELL G. GEHRIS, ROBERT M. GERRITSEN, JACK E. GIBSON, BOB GILLIAM, DONALD D. GNOSE,

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The Defendants are United Airlines, Inc. and Does 1 through 35.

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CONSOLIDATED APPEALS

Sharp v. United Airlines, Inc., et al. Civil Action Number 91-1230, United States District Court for the District of Colorado.

Abbott v. United Airlines, Inc., et al. Civil Action Number 91-1231, United States District Court for the District of Colorado.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Order of Dismissal of the United States District Court for the District of Colorado entered May 22, 1991 is reprinted in the Appendix at page B1.

The Judgment Order of the 10th Circuit Court of Appeals on Appeal from the United States District Court for the District

of Colorado entered June 17, 1992 is reprinted in the Appendix to the Petition at page A1.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1). The Judgment Order of the Court of Appeals was entered on June 17, 1992.

STATEMENT OF THE CASE

This is a commercial anti-trust and *ex delicto/ex contractu* case alleging violations of Federal and State anti-trust statutes and state common law claims for relief.

The Petitioners in this consolidated appeal are 615 former airline pilots, flight attendants, ticket agents, reservation agents, and station agents previously employed by Frontier Airlines.[1] Petitioners were third-party suppliers to specialized markets in which Frontier Airlines and United Airlines competed.

As part of its operations, United maintained a computerized reservation system ("CRS") known as Apollo in which Frontier Airlines, by contract, participated.[2] A CRS such as Apollo computerizes the air carriers' respective reservations systems and permits booking and selling of tickets on the carriers' aircraft.[3]

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[1] The Petitioners in Case Number 91-1230 of the United States District Court for the District of Colorado are former airline pilots and are referred to in the lower Courts as the *Sharp* Plaintiffs. The Petitioners in Case Number 91-1231 in the United States District Court for the District of Colorado are former flight attendants, ticket agents, reservation agents and station agents and are referred to in the Courts below as the *Abbott* Plaintiffs. Both civil actions were consolidated in the United States District Court and in the Appeal to the United States Court of Appeals for the 10th Circuit. The *Sharp* and *Abbott* Complaints are substantially identical.

[2] Appendix at p. A10.

[3] Appendix at p. A10.

The process by which the Apollo computer system, designed by United, displayed flights for selection by consumers was not random; it unfairly favored United flights over those of other carriers.

Following investigation by several federal governmental agencies of alleged anti-competitive and predatory practices of the major CRS vendors, including United, the Civil Aeronautics Board implemented rules ("CRS Rules") designed to restrict the display bias in Apollo, as well as other computer reservation systems, and to correct certain other alleged anti-competitive practices employed by CRS vendors. The CRS Rules became effective on November 14, 1984 and are set forth at 14 CFR Part 255.

During these relevant time periods, United was also entering into various contractual and other agreements to which Petitioners were parties or intended beneficiaries. When these contracts and agreements were later abrogated by United, Petitioners lost and were otherwise deprived of their business and property.

As specialized suppliers to the discrete markets serviced by United's Apollo CRS system, Petitioners were directly impacted by United's use of the Apollo system and other activities. Petitioners' ability to supply these markets with their specialized services and labor was terminated in August of 1986 when Frontier Airlines was forced out of business.

1. Basis for Federal Jurisdiction Below

The Federal Court's jurisdiction for the first five claims for relief in the Petitioners' Complaints, and for the 11th, 12th and 13th claims was founded on 28 U.S.C. 1331, 28 U.S.C. 1337, 15 U.S.C. 15, and 15 U.S.C. 6. Jurisdiction for all other claims for relief in the Petitioners' Complaints was founded on 28 U.S.C. § 1332. Venue for all claims was based on 15 U.S.C. § 15, 15 U.S.C. § 22, and 28 U.S.C. § 1391.

SUMMARY OF ARGUMENT

The core issue before the Court is whether the Petitioners have standing to recover damages sustained when United's anti-competitive and predatory acts eliminated Petitioners' ability to supply and service the markets in which Frontier Airlines and United Airlines competed, and Petitioners did business.

No reported case denies Petitioners standing to bring such claims, and one reported case has established that individuals in the same position as the Petitioners suffer a legitimate anti-trust injury when the market which they supply is invaded by anti-competitive actors.[4]

This Honorable Court has consistently upheld the Petitioners' right of standing, from *Anderson v. Shipowners Association*, 272 U.S. 395, 71 L.Ed. 298 (1926) through *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S. Ct. 2540, 73 L.Ed.2d 149 (1982). In *Associated General Contractors of California Inc. v. California State Counsel of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L.Ed.2d 723 (1983), this Honorable Court held that it was "impossible to announce a black-letter rule that will dictate the results in every case" and set forth a multi-factor analysis used to determine anti-trust standing in a case such as this one. Petitioners meet all of the requirements under *Associated General* and *McCready* necessary for standing.

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[4] *Adams v. Pan American World Airlines, Inc.*, 828 F.2d 24 (D.C. Cir. 1987). As discussed further *infra*, dicta in the *Adams* decision suggests that the question of whether damages suffered by suppliers such as the Petitioners constitutes anti-trust injury requires a trial for resolution, a fact conceded by Respondent in the lower Courts. Respondent admitted in its Answer Brief filed in the United States Court of Appeals for the 10th Circuit that such "a trial would evaluate whether an enhanced level of industry competition would have raised output in such a manner as to result in higher wages, or whether it would have brought on increased pressure to cut costs reducing wages." To date, the Petitioners have never been accorded a trial or the opportunity to redress their damage claims.

ARGUMENT

Section 4 of the Clayton Act provides a treble damage remedy to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws,"[5] and Petitioners have clearly alleged an injury within the meaning of Section 4 of the Clayton Act. The dismissal entered by the District Court and upheld by the Appellate Court was under F.R.C.P. 12(b)(6), which effectively prohibited the Petitioners from presenting *any* evidence on the relevant markets, the alleged anti-trust activities, and the Petitioners' damages. The lower courts concluded - apparently as a matter of law- that because Petitioners were employees of a corporation *also* affected by the Respondents' predatory activities, the Petitioners' damages must have been derivative and Petitioners had no standing to bring an anti-trust claim.[6] The lower courts reached this erroneous conclusion without conducting or even allowing the *required factual inquiry* under the *Associated General Contractors* multi-factor analysis.

I. FEDERAL DECISIONAL LAW AND STATUTE CONFER STANDING ON THESE PETITIONERS.

A. The controlling language of the Clayton Act gives these petitioners standing

The starting point for interpreting a statute is the language of the statute itself. Section 4 of the Clayton Act provides:

> *Any person* who shall be injured in his business or property by reason of *anything forbidden* in the anti-

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[5] 15 U.S.C. § 15.

[6] Because the lower Court's dismissal was rendered under F.R.C.P. 12(b)(6), the Petitioners were deprived of their fundamental due process rights to present evidence in support of their position. Had the lower Court proceeded under F.R.C.P. 56, Petitioners would have and were prepared to present *dispositive evidence* of their standing under the anti-trust laws.

> trust law *may sue therefor* in any District Court in the United State in the district in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney fees.[emphasis added]

This Honorable Court in the *Associated General Contractors* case held that: "A literal reading of the [Clayton Act] is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an anti-trust violation."[7] The Court also noted that:

> 'The [Clayton Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these...The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'[*Id.* at 530, citing *Mandeville Island Farm, Inc. v. Sugar Co.*, 334 U.S. 219, 236, 92 L.Ed. 1328, 68 S.Ct. 996 (1948)]

Although the *Associated General Contractors* case held that it was necessary "to evaluate the Plaintiffs' harm, the alleged wrongdoing by the Defendants, and the relationship between them," 459 U.S. at 534, and announced a multi-factor test, discussed further *infra*, it is clear that the broad language of the Clayton Act encompasses these Petitioners' right of standing to sue as a pure matter of statutory interpretation.

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[7] 459 U.S. at 529, ft.nt. 19.

B. The Guidelines enunciated in Associated General Contractors allow these Petitioners standing to sue

Recognizing that "the infinite variety of claims that may arise makes it virtually impossible to announce a black-letter rule that will dictate the result in every case," 459 U.S. at 536, the *Associated General Contractors* case enunciated the following factors to be considered in evaluating standing: (1) The causal connection between the anti-trust violation and the Plaintiffs' injury; (2) the Defendants' intent or motivation; (3) the nature of the Plaintiffs' injury - i.e., whether it is one intended to be redressed by the anti-trust laws; (4) the directness or the indirectness of the connection between the Plaintiffs' injury and the market restraint resulting from the alleged anti-trust violation; (5) the speculative nature of the damages sought; and (6) the risk of duplicative recoveries or complex damages apportionment.

In considering these factors in the light of the allegations in the Petitioners' Complaints, the Court must "accept all the well-pleaded allegations of the Complaint as true and must construe them in the light most favorable to the Plaintiff."[8]

Petitioners' Complaints alleged: (1) the existence of a direct, proximate, and causal connection between the anti-trust violations and the Petitioners' injuries;[9] (2) that the Defendant

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[8] *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). See, *Hishon v. King and Spalding*, 104 S.Ct. 2229, 2233 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

[9] Petitioners specifically alleged that they suffered direct, actual property damages, unique to themselves, as a proximate result of United's violations of federal and state antitrust laws, which Plaintiffs alleged were foreseeable injuries which occurred within the target area in the relevant markets and were linked to the injury in competition within those markets Petitioners specifically alleged that United's conspiracies in restraint of trade and attempts to monopolize the relevant markets were directly, proximately, and

intended to or was motivated to engage in predatory and anti-competitive conduct;[10] (3) that the nature of the Petitioners' injury is one intended to be redressed by the anti-trust laws;[11] (4) that the Defendants' predatory and anti-competitive conduct in restraint of trade was directly related to targeting the Plaintiffs in the market which Plaintiffs supplied;[12] (5) that the damages alleged are not speculative and can be easily determined by a

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causally related to the Petitioners' injuries. Petitioners' consolidated Complaints at paragraphs 56, 57, 61, 65, 69, 73, 81, 85, 89, 92, 96, 100, 104, 108, 112 and 115.

[10] Petitioners specifically alleged that United knowingly and willfully monopolized and/or attempted to monopolize with specific intent the relevant markets wherein Plaintiffs offered their specialized services and labor, and that United knowingly and willfully used its contractual and economic position in restraint of trade, willfully engaged in primary line price discrimination with specific intent, willfully engaged in exclusive dealing arrangements with specific intent, knowingly extended certain special services and privileges which were not extended to other purchasers in the relevant markets with specific intent, and intentionally, knowingly and willfully engaged in predatory and anti-competitive conduct in restraint of trade. Petitioners' consolidated Complaints at paragraphs 56, 60, 64, 68, 72, 76, 80, 84, 95, 99, 103, 107, 111.

[11] Petitioners have specifically alleged that their injury is the kind of injury intended to be redressed and covered by federal and state anti-trust laws. Petitioners allege that their "foreseeable injuries occurred within the target area of those [relevant] markets and were linked to the injury to competition within those markets caused by United," and that Petitioners' damages "were incurred within the zone of legislative concern these [anti-trust] statutes address." Petitioners' consolidated Complaints at paragraphs 57, 60, 64, 68, 72, 80, 84, 89, 92, 96, 100, 104, 108, 112, 115.

[12] Petitioners' specifically allege that the Defendants' predatory anti-competitive conduct in restraint of trade "occurred within the target area" of the relevant markets and was directly related to targeting the Plaintiffs in the markets in which Plaintiffs supplied their specialized services and labor. Petitioners' consolidated Complaint at paragraphs 63, 68, 72, 87, 91, 95, 99, 103, 107, 111, 114, 117.

jury or a Court of law; [13] and (6) that there is no risk of duplicative recovery or complex damages apportionment.[14]

On its face, therefore, the Petitioners' Complaint adequately alleged *all of the factors* under *Associated General Contractors* necessary to confer standing on Petitioners to bring suit. Because the lower Court may only uphold dismissal under F.R.C.P. 12(b)(6) "when it appears that the Plaintiff can prove no set of facts in support of the claims that would entitle the Plaintiff to relief,"[15] and must "accept all the well-pleaded allegations of the Complaint as true and must construe them in the light most favorable to the Plaintiff,"[16] it is clear that Petitioners adequately alleged standing to sue sufficient to withstand a Rule 12(b)(6) Motion to Dismiss.

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[13] Petitioners have specifically alleged that their damages are "neither duplicative nor remote, nor do they require any apportionment between other parties' damages, nor will an award to Plaintiff dilute the incentives of any other parties to bring suit" under the antitrust laws. Petitioners' damages can be easily determined by the finder of fact. Petitioners' consolidated Complaints at paragraphs 57, 61, 65, 69, 73, 81, 85, 89, 92, 96, 100, 104, 108, 112, 115.

[14] Petitioners have specifically alleged that there is no risk of duplicative recovery or complex damages of apportionment, and that their damages "are neither duplicative, speculative, nor remote, nor do they require any apportionment between other parties' damages, nor will an award to Plaintiffs dilute the incentives of any other parties to bring suit" under the anti-trust laws. Petitioners' consolidated Complaints at paragraphs 57, 61, 65, 69, 73, 81, 85, 89, 92, 96, 100, 104, 108, 112 and 115.

[15] *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991) (citing *Hishon v. King and Spalding*, 467 U.S. 69, 73 104 S.Ct. 2229, 2233 (1984).

[16] *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991).

C. Additional Federal decisional law reaffirms Petitioners' standing to sue.

In the case of *Adams v. Pan American World Airways, Inc.* 828 F.2d 24 (D.C. Cir. 1987), which the Court of Appeals below characterized as "remarkably similarly to this case,"[17] the United States Court of Appeals for the D.C. Circuit held that airline employees such as the Plaintiffs herein fall within the ambit of "suppliers" to the relevant market and suffer *a legitimate anti-trust injury* when that market is invaded by anti-competitive actors.[18]

In *Blue Shield of Virginia v. McCready* 457 U.S. 465, 73 L.Ed.2d 149, 102 S.Ct. 2540 (1982), this Honorable Court upheld a Plaintiff's right of standing under analogous circumstances. The issue in *McCready* was "whether a subscriber who employed the services of a psychologist has standing to maintain an action under Section 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment."[19] The Plaintiff alleged that Blue Shield had engaged in an unlawful conspiracy - essentially a boycott - to exclude psychologists from receiving compensation under Blue

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[17] Appendix at p. A13.

[18] Plaintiffs in *Adams* are essentially the same as Petitioners herein, namely airline employees who supplied the airline transportation market with specialized services in the form of their labor to competitors in that market. In holding that airline employees are suppliers to the air transportation market, and suffer a legitimate anti-trust injury when that market is violated by anti-competitive conduct, the Federal Circuit Court held:

> Plaintiffs supply services (their labor) to competitors selling in the market...We believe the Plaintiffs can properly be said to have alleged an anti-trust injury - the failure to secure employment comparable to their Laker jobs from the date of Lakers folding to the filing of the Complaint."[828 F.2d at 27]

[19] 457 U.S. at 467.

Shield's plans; the Plaintiff was not a psychologist herself, but only a subscriber to the Blue Shield plan.

The *McCready* Court held that the remedy under Section 4 of the Clayton Act cannot reasonably be restricted only to those competitors whom the Defendants hoped to eliminate from the market, and that Section 4 standing is not precluded merely because the Plaintiff's injury did not reflect the "anti-competitive" affect of the alleged boycott. The *McCready* court concluded that the Plaintiff had standing and that her injury was of the type the anti-trust laws were intended to prevent.[20]

The *McCready* Court held that, in determining whether a person has sustained injuries too remote from an anti-trust violation to give them standing to sue for damages under Section 4 of the Clayton Act, the Court must look: (1) to the physical and economic nexus between the alleged violation(s) and the harm to the Plaintiff; and (2) more particularly, to the relationship to the injury alleged to those forms of injury about which Congress was likely to have been concerned in making the Defendant's conduct unlawful and providing a private remedy under Section 4. As with the factors enunciated by the *Associated General Contractors* case, Petitioners herein specifically alleged *all of the elements necessary* under *McCready* to grant standing: Petitioners alleged and are prepared to establish the existence of a demonstrable physical and economic nexus between United's use of the Apollo CRS system and other predatory tactics and the direct harm suffered by the Petitioners as a result, as well as the direct relationship of the injuries sustained to those areas of injury specifically protected by the anti-trust laws.[21]

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[20] 457 U.S. at 482-85.

[21] The lower court's summary dismissal of this action *before* any evidence could be adduced and presented deprived the Petitioners of the ability to introduce compelling and dispositive evidence relevant to the factual standing inquiry called for under *McCready*.

Like the Plaintiff in *McCready*, these Petitioners have alleged a "purposefully anti-competitive scheme," and seek "to recover as damages the sums lost...as the consequence of [the Defendants'] attempt to pursue that scheme." 457 U.S. at 483. The *McCready* Court pointed out that a Plaintiff "need not 'prove an actual lessening of competition in order to recover.'" 457 U.S. at 482. The *McCready* Court concluded:

> Although McCready was not a competitor of the conspirators, the injury she suffered was *inextricably intertwined* with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think the McCready's injury 'flows from that which makes Defendants' acts unlawful' within the meaning of Brunswick [Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 50 L.Ed.2d 701, 97 S.Ct. 690 (1977)], and falls squarely within the area of Congressional concern. [457 U.S. at 484][emphasis added]

These Petitioners fall squarely under the *McCready* analysis concerning standing. Just as the Plaintiff in *McCready* (a consumer of psychotherapy services) was affected by the Defendants' conspiracy to target psychotherapists, so too these Petitioners (suppliers to the relevant markets) were affected by and inextricably intertwined with United's conspiracy to target Frontier Airlines and others and eliminate competition. Just as the Plaintiff in *McCready* was neither too remote nor excepted from the harm proximately caused by the unlawful conspiracy, so too these Petitioners - whose entire livelihood and commercial existence was dependent upon their ability to supply the markets which the conspiracy targeted - have suffered a direct and legitimate anti-trust injury of the kind the anti-trust laws were intended to prevent. The Petitioners' inqury was "inextricably intertwined" with the injury United sought in inflict on the marketplace.

Furthermore, the two Tenth Circuit decisions (pre-*Associated General Contractors)* relied on by the lower Courts do not eliminate the standing conferred on Petitioners by the *McCready, Adams, and Associated General Contractors* cases.

In *Reibert v. Atlantic Richfield*, 471 F.2d 727 (10th Cir. 1973), a merger occurred which was challenged by an employee pursuant to Section 7 of the Clayton Act, and the "issue boil[ed] down to whether or not anti-trust laws are directed towards employees injured by an alleged illegal merger." 471 F.2d at 729. The Tenth Circuit prohibited Reibert from suing his employer because Reibert was neither a seller nor supplier "constituting the market" and therefore not in the area of the economy "endangered by a breakdown of competitive conditions." 471 F.2d at 732.

In *Jones v. Ford Motor Company*, 599 F.2d 394 (10th Cir. 1979), the Tenth Circuit held that "shareholders and employees do not have standing to sue for anti-trust violations that injure a corporation." 599 F.2d at 397.

The principles followed in *Reibert* and *Jones* stand for the proposition that employees may not sue their employers for anti-competitive activities which ultimately injure the employees. In reliance on the pre-*Associated General Contractors* cases of *Reibert* and *Jones* to uphold the district court's dismissal, the lower Appellate Court stated:

> Applying [the six factors enunciated under *Associated General Contractors*], as well as Tenth Circuit precedent pre-dating those Supreme Court cases but incorporating *similar factors*, we conclude Plaintiffs lack standing.[emphasis added][22]

The above-cited language of the Tenth Circuit in this case indicates that this Circuit is utilizing a hybrid recipe for deter-

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[22] Appendix at p. A13.

mining standing which is *more limiting* and *different from* the *actual* multi-factor test enunciated by *Associated General Contractors*. Because the Tenth Circuit's analysis is more limiting than that required under *Associated General Contractors*, these Petitioners - by virtue of filing suit in the Tenth Circuit - are being unconstitutionally deprived of their standing rights under federal and state anti-trust laws.

The Petitioners were suppliers to the unique and specialized market in which United competed with the Petitioners and their employer. Both the *Reibert* and the *Jones* decisions "recognized that different results may be reached when Plaintiff-employees are in essence 'quasi-businessmen operating in a market carved out by their own aggressiveness and salesmanship qualities. Thus when their employers engaged in anti-competitive practices, the employees were directly injured by these violations."[23] This recognized exception clearly encompasses these Petitioners, who as suppliers of a specialized form of air service, had "carved out" a unique niche in the Rocky Mountain area.

Moreover, these Petitioners are neither stockholders, shareholders, nor employees of United, and are not alleging that any anti-competitive activity on behalf of their employer ultimately causes them harm. Rather, these Petitioners have alleged that United engaged in a conspiracy and restraint of trade - similar to that found in the *Adams* case and analogous to that found in the *McCready* case - which directly targeted the Petitioners as suppliers to the market place and proximately resulted in their damages.

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[23] Appendix at pps. A15. See *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 730 (10th Cir. 1973)

II. THE LOWER COURTS ERRED IN DISMISSING THE PETITIONERS' COMPLAINT UNDER F.R.C.P. 12(b)(6) WITHOUT ALLOWING PETITIONERS AN OPPORTUNITY TO BE HEARD AND TO PRESENT EVIDENCE

Nothing is more fundamental to the system of justice then a party's right to be heard and to present evidence in his own behalf. Rule 12(b)(6) Motions to Dismiss are disfavored procedurally because they operate to deprive a party both of a trial on the merits and an opportunity to be heard. As this Honorable Court has held on numerous occasions, "a Complaint should not be dismissed for failure to state a claim [under F.R.C.P. 12(b)(6)] unless it appeared *beyond doubt* that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[24]

Although the multi-factor test enunciated by *Associated General Contractors* for determining standing questions involves many factual inquiries, such as a causal connection between the anti-trust violation and the Plaintiffs' injury, the Defendant's intent or motivation, the nature of the Plaintiffs' injury, the directness of the harm, and the nature of damages, Petitioners were deprived of *any opportunity* to present evidence on these issues. The lower Courts simply concluded that the Petitioners should not be conferred standing, although the *Associated General* factors were alleged in the Petitioners' Complaint and the Petitioners were prepared to present dispositive evidence and testimony reaffirming their standing to sue.

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[24] *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)(emphasis added). See, *Hishon v. King and Spalding*, 467 U.S. 69, 73 104 S.Ct. 2229, 2233 (1984)("A Court may dismiss a Complaint only if it is clear that no relief could be granted under *any set of facts* that could be proved consistent with the allegations.")(emphasis added)

In fact, the Appellate Court below stated that Petitioners' "mere *assertion* that they are the direct victims of United's anti-competitive scheme is insufficient to convince us otherwise."[25] This is error as a matter of law. The lower Court's analysis *must* construe the allegations of the Complaint as deemed admitted and true under Rule 12(b)(6), and must then resolve *all inferences* in favor of the Plaintiffs.[26]

It is one thing to deprive a party of standing *after* an appropriate factual and legal analysis has been completed and the party has had a full opportunity to present all evidence in support of his position; it is quite another thing to summarily deprive a party of standing when the allegations of a party's Complaint - deemed admitted and true by the operation of law - alleges the factors required to confer standing.

III. THE LOWER COURTS ERRED IN SUMMARILY DISMISSING PETITIONERS' STATE LAW CLAIMS

The lower Courts summarily dismissed Plaintiffs' anti-trust and *ex delicto/ex contractu* state law claims under Rule 12(b)(6). In the case of Petitioners' state anti-trust claims, while the standing requirements are similar under state and federal law, they are not identical.[27] As alleged in the Petitioners' Complaints, the Colorado anti-trust statutes are broad and encompassing and Petitioners clearly have standing thereunder to sue.[28]

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[25] Appendix at p. A18. (emphasis original)

[26] *Conley v. Gibson, supra.*

[27] *People v. North American Furniture and Appliance*, 645 P.2d 1291 (Colo. 1982).

[28] Appendix at p. A19.

Petitioners' *ex delicto/ex contractu* claims should not have been dismissed because each claim adequately states the required elements under state law.[29]

Additionally, the Appellate Court below erred in not reversing the lower District Court's dismissal of Plaintiffs' *ex contractu/ex delicto* claims because extraneous materials were presented and not excluded, which required that the Motion be "treated as one for Summary Judgment and disposed of as provided in Rule 56," with the Petitioners being "given reasonable opportunity to present all material made pertinent to such a Motion by Rule 56." F.R.C.P. 12(b).

Neither the District Court nor the Appellate Court below treated the Rule 12(b)(6) Motion as one for Summary Judgment under Rule 56 as required when extraneous materials are presented and not rejected by the court. This constituted error as a matter of law.

CONCLUSION

Over 600 individuals will be damaged and deprived of a remedy if this Honorable Court does not reverse the lower Court's dismissal under Rule 12(b)(6) of Petitioners' Complaint for lack of standing. Petitioners have alleged their standing as required by the factors enunciated in *Associated General Contractors*, and fall squarely within the ambit of protected individuals who are entitled to bring treble damages claims for anti-trust injuries under Federal anti-trust laws.

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[29] Petitioners have alleged breach of contract/third party beneficiary and tortious interference with business advantage and economic opportunity claims. Each of the elements necessary to these claims have been alleged and set forth in Petitioners' Complaint. The claims, as alleged, are sufficient under Colorado law to withstand the Rule 12(b)(6) Motion to Dismiss. *Sanders v. Black*, 136 Colo. 417 318 P.2d 1100 (1957). See *Conley v. Gibson, supra.*

The fact that each federal circuit court - particularly the Tenth Circuit - is imposing a different standing requirement than under *Associated General Contractors* clearly underscores the dramatic need for a resolution of the above-presented standing issue.

The Petitioners have alleged standing to sue and clearly and unequivocally fall within the auspices of the Clayton Act and prior decisions of this Honorable Court outlining the necessary requirements for standing. Petitioners are not seeking justice, but a *chance* for justice.

Accordingly, Petitioners respectfully submit that a Petition for Certiorari should issue to review the judgment of the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1230

CAREY F. SHARP, ROGER O. BROOKS, ROBERT L. WILLIAMS, BILL J. WATKINS, ROBERT W. VANCE, JOSEPH D. ABELL, JEFF ABRAMS, JAMES M. ACTOR, DANEIL R. ADAIR, , MALCOLM C. AF UHR, JAMES H. ALLEN III, JIM D. APPLEBY, TERRY E. ARMBRISTER, B. A. ARNOT, DOUGLAS A. BADER, DANIEL A. BAKER, THOMAS A BANISTER, FORREST H. BAILEY, JR., JACK M. BAILEY, LAWSON E. BARCLAY, JOHN A. BATA, ROBERT G. BEABOUT, PATRICK J. BECKHAM, CHARLES E. BEVILLE, LOWELL K. BILSBOROUGH, ERIC L. BJORN, GARY G. BLANCHARD, GREGORY M. BOYER, WHITNEY A. BRANDON, RICHARD C. BRIGHT, DEAN ELTON BRISTOL, TEDDY E. BROCK, MICHAEL J. BRONOWSKI, MICHAEL F. BRUMFIELD, JAMES W. BURMAN, JOHN E. BURT, MICHAEL B. BURTON, DAN J. CADY, CHARLES T. CALKINS, JAMES W. CANNON, PAUL W. CAREY, VERNE W. CARLSON, CHARLES L. CARPENTER, LLOYD D. CARR, WALLACE E. CARROLL, FRED W. CHAPMAN, DOUG E. CHRISTENSEN, ROBERT H. CHURCHILL, SAM P. CLARK, NICOLAS S. CLINGER, KENNETH COGGESHALL, HOWARD COLLING, DAVID B. COMISH, JOHN F. CONNORS, EARNEST D. COOK, DENNIS M. COX, GARY L. CRAVEN, JON N. CROUCH, MICHAEL R. DACIEK, RICHARD P. DAKE, JOHN L. DAMERON, WILLIAM K. DENDY, GARY M. DeSPAIN, MELVIN D'LOSS, DONALD E. DONALDSON, JOHN A. DUNCAN, DENTON J. DYKES, NORMAN R. EDSON, DAN C. FARLIN, WALTER A. FELIZIANETTI, JOSEPH H. FER-

GUSON, DENFORD D. FINKE, RICHARD R. FISCHEL, HAROLD L. FLETCHER ROBERT L. FOLKEN, JAMES E. FORD, RICHARD C. FORD, H. A. FROST, MYRON E. GADOW, RUSSELL G. GEHRIS, ROBERT M. GERRITSEN, JACK E. GIBSON, BOB GILLIAM, DONALD D. GNOSE, SCOTT H. GORDON DOUGLAS C. GRECO, JOHN E. GREEN, LANNY R. GREEN, BARRY L. GREENFIELD, ROBERT C. GRISANTI, ROBER V. GUINTHER, THOMAS E. GUMMER ORDON E. HADLOW, CHARLES R. HAMMARSTROM, MICHAEL D. HAMPTON, DOUGLAS J. HANSON, JAMES L. HANSON, DANIEL C. HARDESTY, VICTOR K. HARPER, ALAN L. HARRIS, JAMES N. HASS, CLYDE F. HART, JR., WOODROW HASSINGER, PAUL C. HAYNIE, SCOTT L. HEIN, CHARLES E. HERIN, WILLIAM F. HINES, FRANK HOFFMANN, THOMAS L. HOLLISTER, GRANT LEON HOLMES, THOMAS H. HORAN DAVID B. HOUK, PHILLIP D. HUEBNER, DAVID D. HYDE, MARK E. INGRAM, DENNIS M. IRVINE, JOHHNY M. IVERSON, TERRY C. JACKSON, TERREL F. JOHNSON, ROBERT W. JOHNSTON, GERALD H. JONES, DONALD JAMES JONES, PAUL W. JONES, DAVID W. JOYNER, ROBERT F. KANIVE, BARRY D. KANKEL, DAVID P. KAPLAN, RICHARD C. KARDELL, TERRY W. KARPEN, JOSEPH H. KILLILNGER,TERRANCE G. KING JAMES D. KLAUE, RICHARD D. KLUMKER, JAMES G. KNEPPER, MARLAND D. KNIGHT, DAVID S. KOHLER, MILTON P. KUDLAC, JAMES T. KUNC, GARY J.KUNTZ, CHARLES G. LAMBERT, PETER H. LAMKIN, JOHN P. LANDWEHR, DONALD C. LAUSTRUP, ROBERT S. LEBRECHT, PETER B. LEE, CHARLES A. LEVINE, CRAIG V. LIBSACK, ERNIE LINDGREN, ROBER D. LIPPERT, HOWARD R. LOGAN, CAROL LOOS, CARL A. LORENZEN, A. SHANE LoSASSO, CHARLES L. LYNCH, WILLIAM R. MacLEOD, JAMES T. MAGNER, RUDY MAPELLI, GARY J. MARKHAM, DONALD J. MARSO, THOMAS Z. MARS, DAVID C.

MARTIN, JAMES ROBERT MARTIN, JOHN G. MAXWELL, STEVEN C. McCONNELL, ROBERT L. McCOY, DONALD R. PRATT, JAMES M. McGHEE, HERVEY R.McGLASHAN,DANIEL A. MICHALAK MARK A. MISCHKER, GARY T. MILLER, LYNN H. MILLER, NEIL F. MILLER, EARLE R. MORRIS, DEWEY F. MROSLA, FRANK A. MOSELEY, MARTY M. MULKEY, WILLIAM A. NEFF, OTTO M. NESSLER, ARTHUR L. NEWMAN, EDWARD E. NIELSEN, ERIC R. NIELSEN, RONALD A. NIELSEN, FRED WILLIAM BENDORF, HAROLD D. OSBORN, WILLIAM C. PABST, JR., ROBERT RICHARD PARKER, H. A. PARTEN, JOSEPH L. PATTISSON, ERNEST R. PENNYWEIGHT, DANIEL F. PERSCHAU,STANLEY G. PETERS, J. P. PHELPS, L. A. PHILLIPS, DAVID A. POPPERS, LAWRENCE R. PORTLOCK, ROBERT A. PRANGE, ARTHUR P. RAINBOLT, CURTIS D. RAMPTON, HENRY P. RANKIN, BRUCE W. RENSTROM, HARRY D. RICHARSON, DONALD E. RIEBE, CLAY C. RIECKER, THOMAS P. ROBERTSON, JACK S. ROBINS, RONALD J ROSENHAHN, WALKER L. ROSS, ROBERT F. ROSSI, CLYDE RUCH, MAURY W. RYAN, ROBERT SANCETTA, THOMAS D. SANNE, MILES B. SCRIBNER, JACK M. SEAWELL, CHARLES G. SEEFLUTH, CORDELL W. SHAW, THOMAS J. SIEMS, GEORGE L. SIMS, JR., CLIFF R. SIPPLE, KEITH L. SLEATER, FRED O. SMITH, MARC, R. SNOW, JERRY D. STALL, GARY C. STAVES, A.P. STEARNS, A. JOHN STEINBERGER, RICHARD P. STEVENS, ROBERT R. STONE, DONALD E. STRALEY, RICHARD B. SUNDQUIST, GEORGE H. SWAN, III, FREDERIC L. SYMMES, C. CURRY TAYLOR, PAUL A. TAYLOR, CHARLES G. THOMAS, TERRY G. THOMPSON, WILLIAM H. THORP, CHARLES E. TRANTHAM, H. V. TRUSX, GARY L. TURNER, IVAN TYLER, JOHNNIE L. TYLER, ROBERT C. ULLRICH, ARCHIE D.

VAN BEEK, ROBERT W. VANCE, TYLER J. VANCE, GEORGE L. VEGA, DAVID R. VANDERHOOF, RICHARD G. WADE, MICHAEL L. WALDRON, WILLIAM D. WALKER, JAMES N. WALRAVEN, ROBERT G. WARINNER, EMILY H. WARNER, JAMES E. WALSH, HERBERT L. WEICKUM, GEORGE H. WHEELER, J.R. WILLIAMS, ROBERT L. WILLIAMS, ROBERT A. WILSON, WARREN J. WILSON, JOHN T. WINTER, R. W. WISE, C. WESLEY WOOCOCK JR., EDWARD T. WOODSON, REGINALD L. WYATT, WILLIAM D. WHITTAKER, JAMES M. CURRIE, WALLACE E. REES, CHARLES A. BLACKWELDER, JAMES S. BUILCK, DENNIS E. KOONTZ, JOHN R. HAM, RONALD B. SMITH, RONALD N. HECKMAN, MARK B. ROSENHAHN, ED D. TRIMBLE, TOM S. SMITH ROSS H. TAYLOR, JR., RICHARD G. MARTIN, CHARLES D. WAMBOLT, DANIEL E. YOUNG, JOHN W. HEIMBURGER, DENNIS W. McCRIGHT, JAMES D.ERNST, DAVID G. SANCTUARY, LARRY A. FREAR, A. DAVE WARDLE, PAUL D. SINGER,FRANK H. MALONE, JAMES H. KEANE, DANIEL K. ALBERS, JAMES W. ALBRITTON BOBBIE B. BAGSHAW, ROGER A. BAIRD, JAMES R. BENNETT, WILLIAM A. BRODIE, LARRY D. BRUTON, DEXTER L. DANO, WALTER C. DAY, ALAN C. FISHBACK, JACOB A. GASPER, GERALD D. GOSS, EARL J. GUIDRY, JR., R. KENT HAMMON, JOHN P. LA MONTAGNE,KENNETH O. LARASON, MARVIN R. LARSON, LANCE M. LAU, DANIEL A. GUNN,DAVID A. LUNDY, ROBERT W. METHVAN, LUCINDA M. MORGAN, THOMAS J. MORHOUSE, WILLIAM A. OWENS, EUGENE B. POSTLEWATE, JAMES M. POTTER, DAVID B. RAMPTON, ROBERT T. SAMPSON, ROGER A. SHINKLE, EARL M. MORENCY, THOMAS J. SHRINER, FRANK T. SKUBIS, FRANK J. SONNEMAN, GLEN C. SPAKES, THOMAS A. SPONSLER, LLOYD D. STOOPS, EDWARD M. TEEL, JOSEPH A. TESAR, MARION J. TONGISH,

PATRICK A. TURNER, ROBERT B. WALKER, MARK A. WENG, RICHARD I. BOMBARD, CHESTER H. WHITE,II STEPHEN F. GATSCHET, DAVID E. CIABATTONI, KENNETH L. TAYLOR, R.B. ALLEY'SMITH, R.R. ANDERSON, N.K. BLOOMQUIST, J. J. BUICK, D. A. CARTIER, P. T. DENNIS, J. R. HAM, R.J. KLUMB, R.P. MCDONALD, J.L. MCLAUGHLIN, C. D. MILLER, D. J. OSMUNDSON, G. H. OTT, W. A. OWENS, E. R. PIERCY, B. L. RILEY, R. W. ROBINSON, S. L. ROSEVEAR, D. L. STOKES, C. E. SULLIVAN, N. J. THOMPSON, S. R. THRAPP, V. V. VAUDRIN, W. L. WARDELL, H. G. WISSEMAN

Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC., and DOES 1 through 10,

Defendants-Appellees.

No. 91-1231

NINA M. ABBOTT, ALAN K. ABEL, WILLIAM E. ADAIR, KAREN AKERS, MARTINA H. ALBERS, BETTY K. ALEXANDER, LESLIE J. ALLEN, STEVEN S. ALTMAN, DARRELL ANDERSON, KEVIN L. ANDERSON, NINA E. ANGELO, CAROLYN ANTONUCCI, CAROLYN V. ARCHER, PATRICK E. ARCHULETA, GINGER AUSTON, KEITH A. BAILEY, RICK A. BALDWIN, BARBARA BENDER, M. KATHLEEN BENNINGTON, ELAINE M. BETTEZ-WABEL, CONNIE K. BLAHA, CYNTHIA BLANCHARD-KRONIG, JUDITH BLUMENHEIN, PHILIP J. BOLT, CHRISTINA E. BONATTI, DARLENE J. NORMAN f/k/a DARLENE J. BOOKER, MELANIE E. BOYD, JAMES M. BOYLE, DWIGHT P. BREND, CAROL M. BRISTOL, ALDENA F. BROWN, JANIE BRUEGGEMAN, DAVID J. BRULEY, ANN BUNN, ROBERT J. BURGER, STEVEN P. BURGER, TERI DRISKELL, f/k/a TERI BUT-

LER, MERRIBETH BRYANT, JUDITH L. BYER, DAVID E. CARTER, DENNIS S. CASADORO, DONNA M. CASTILLO, LENORA A. CHAVEZ, MARY LOU CHRISTENER, CHERYL L. COE, SUSANNA L. COHEN, MARSHA L. COMSTOCK, DAVID L. CONLEY, KRISTA JO CONLEY, ERIC F. CONWAY, SHIRLEY L. COOK, BAMBI COONS, GEORGE W. CROSS, MARCIA M. CRUMP BEVERLY CUMMISKEY, PAMELA CUNNINGHAM,RANDY L. DAVIS, DOROTHY D'AGOSTINO, SUSAN K. SPAULDING, f/k/a SUSAN K. DEERE, SANDRA DeSHAZOPRACHYL, f/k/a SANDRA DeSHAZO, SHARON L. KINCAID, f/k/a SHARON L. DeYOUNG, MICHAEL J. DIBBLEE, DEBRA A. JERENTOWSKI, f/k/a DEBRA A. DINGERSON, RANELL D. DODGE, MARK J. DUNCAN, LANETTE DUNCAN, JANA DUPREE, JULEE A. EGLOFF,DEBRA L. EICHLER, CRIST ELLIS, PAMELA L. ELLIS, KELLY H. ENGELHART, JEANNINE L. ERICKSON, JEANETTE M. EVANS, IRENE M. FAIRWEATHER, LINDA S. WHELAN, f/k/a LINDA S. FECHNER, CYNTHIA F. FELIZIANETTI, MARVIN D. FLOYD, GAIL FOGG, JOANIE M. FOHN, DOUGLAS J. FRENCH, PAMELA R. FRIEND, DOLORES FULSCHER, MARY M. GABLE, TIM J. GARCIA, CYNTHIA A. GARTEN, VICKY GAUDET, MARK P. GAUDREAU, ADA K. GEHMAN, CAROL L. GRIEBLING-ROGERS, DIXIE L. GIBSON, TERRE L. GLEASON, EDDY R. GOOD, BRIAN GRANDY, LINDA RAVES, FRANCIS E. GRAYBEAL, HENRY J. GREATHOUSE, THEODORE M. GREGG, BILL M. GREINER, JOANNE R. GRIFFIN, PEGGY L. GRIFFIN, TIMOTHY J. GRIFFIN, HOPE K. GUMBERT-JENSEN, M. JANE HAGGART, DIANE HALL, DONALD W. HAMILTON, ESTATE OF THOMAS A. HAMPTON, f/k/a THOMAS A. HAMPTON, ELLEN HANDLEY, CONNIE HANEKE, MICHAEL D. HARRISON, ROBIN HARRISON,DONALD S. HARTJE, LINDA HARTZELL, JAMES N. HARTZER,

PAULA HAZLETT, JOHN E. HEMPHILL, MARY ANN HENDERSON, LeALLAN HENNEBERG, TRACY D. HERONEMA, PAULETTE J. HIGGINS, KATHERINE E. HINES, DANE E. HOCH, JEFFREY R. HOFER, MARCIA L. HOGAN, MARILYN R. HOLDSWORTH, ELIZABETH HOLMES, PATRICIA HOOD, ADRIANNE HOWELL, BEVERLY ANN HOWELL-WILSON, CONSTANCE D. HUISKEN, DENISE S. HURD, DIANA D. JACOBSEN, JAYNIE D. JETTE, CAROLYNN S. JOHNSON, BETINA D. JONES, GLENN C. JONES, JO ANN JONES, DONALD F. KADRMAS, SHARRI KANKEL, ROBERTA J. KARR, JACQUELINE KENNEDY, RICHARD A. KENNON, NANCY J. KNIGHT, SANDRA S. KOUNALIS, ROBERT K. KUNDE, LARRY KNUDSVIG, DAREL LYNN LADD, FRANK LAGUNAS, MELINDA J. TITUS, f/k/a MELINDA J. LAMB, TAMI LANDES, ELISABETH LANE, PAUL A. LAPRAD, VYANNE K. LAUSTRUP, GARY L. LEE, JANICE LEFLER, LINDA A. LEISER-ABREU, LORETTA H. LESHER, RITA M. LEWIS, TODD LINK, STEPHANIE L. LoSASSO, ROBERT J. LOYD, MARCIE D. LUBIN, CINDY A. LUEBKE, GARY LUNDBERG, LESLIE J. ESPANOL, f/k/a LESLIE J. LUTHER, LOREN J. MACH, RUSSELL MAGNUSON, LINDA JO MANDELKOW, LINDA J. MANSANAREZ, JOHN J. MARKS CHARLIE R. MARQUEZ, LeROY E. MARSHALL, CYNTHIA L. MATHEWSON, JOSEPH A. MATZ, ALICE MAURIER, DEBORAH A. MAXEY, CONNIE J. McALISTER, ALAN A. McATEE, DAVID H. McCALL, L. KATHLEEN McCORMICK, JEAN L. McDONALD, DEIDRE E. McGEE, SUZANNE L. McGLASHEN, SABRINA McGRANAHAN, DEANNA J. McKENNA, BRUCE C. McKENNEY, R.G. McLACHLAN, VICKIE R. MEDLEY, JEMA MENDELSBERG, JULIE METHVEN, RICHARD L. MILLER, LAWRENCE B. MODROW, MICHELLE MOORE, CHERYLANN A. MORGAN, MARY JO MULLER, GLENN W. MULLINS,

GEORGE M. K. MYERS, ROBERT J. NALEVANKO, CHRISTINE A. NEIL, KEITH J. NELSON, JOHN R. OAKELEY, LELA O'CONNOR, LYNDA O'NEAL, STEPHEN S. PACKARD, PATRICIA A. PAGE, EILEEN L. PATTERSON, MARLYS PAYNE, CONNIE M. POETIRAY, CAROLYNN A. POPE, BRIAN POPP, DONALD A. PORTER, GRETCHEN PORTER, SHERRY B. PORTLOCK, SUSAN S. POSTLEWATE, YOLANDA P. POWELL, BARBARA J. REYNOLDS, MICHAEL A. RICHARDSON, RANDALL L. RIECK, LYNN M. ROBINS, GLORIA A. ROMAN, CLAUDIA RONHOLDT, ALANA K. RUA, JUDY M. RUNDLE, LYNN J. SABATELLE, HARRY SAMUELSON, LINDA M. SANDOS, HORACE B. SCHENCK ESTATE OF EVA M. SCHIELE, f/k/a EVA M. SCHIELE, JOYCE E. SCHMID, ROBERT D. SCHNEIDER MONICA E. SCHULTZ, LARRY L. SCOFIELD, LISA R. SEALS, SHARON H. SELLER, BRANDY SHOWALTER, CHERYL A. SILER, BARBARA A. SLOAN, DIANE T. SMITH, JULIE M. SMITH, PATTY H. SMITH, VICKIE L. SMITH, BERNARD J. SMOLCZYK,BARRY L. SMOLENSKE, JoANN C. SNELL, BETSY A.SPRANGERS, FLORENCE STARKS, CYNTHIA J. STEELE, LYNNE T. STERNER, CAROL P. STILLMAN, SHAN D. SUTTON-BRADLEY, PATRICIA E. TAYLOR, PATRICIA A. THACKER, BARBARA F. MEAD, f/k/a BARBARA THOMAS, JANE D. THOMAS, STEPHANIE TRENCK, JEAN M. URBAN, ROXANN POOL, f/k/a ROXANN VAN CISE, VICKY VELDBOON, CARLOS VERPLANK, RICHARD VLACH, CONNIE R. VOLSKIS, EUGENE N. WANGLER, BILLYE FAYE WASHINGTON, LuANNE WATERS, AUVERNE H. WATKINS, MARY WEIL, KENNETH J. WIENTJES, KATHLEEN A. WEISIGER, FEROL WHITE, ORVILLE L. WHITE, JACQUELINE J. WILLIAMS, CAROL WOLFE, PATRICIA WOOD, ASTRID P. WOODRUFF, MICHAEL A. WOODRUFF, ROBERT H. WRIGHT, M. BETH WYATT,

LINWOOD V. WYNCOOP, JR., JULES WYUM, LISA M. ZEMAN, DEL E. ZIMMERMAN, SHIRLEY ZORETIC,

Plaintiffs-Appellants,

v.

UNITED AIRLINES, INC., a Delaware Corporation, and JOHN DOES 1-25,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NOS. 90-M-1507 and 90-M-1510)

Kenneth A. B. Roberts, Jr., Kenneth A. B. Roberts, P.C., Denver, Colorado attorney for Plaintiffs-Appellants, Sharp, et. al.

Craig W. Donaldson (John S. Retrum with him on the briefs), Retrum, Retrum & Donaldson, Lakewood, Colorado, Attorneys for Plaintiffs-Appellants, Abbott, et al.

Henry C. Thumann, O'Melvany & Myers, Los Angeles, California (Wallace M. Allen, Bernard . Barmann, Jr., O'-Melvany & Meyers, Los Angeles, California; Andrew J. Petrie and Rich L. Bethke, Kirkland & Ellis, Denver, Colorado, with him on the brief), Attorneys for Defendants-Appellee, United Air Lines.

Before LOGAN, ANDERSON, Circuit Judges, and THEIS* District Judge.

The Honorable Frank G. Theis, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

In this consolidated appeal,[1] plaintiffs, a group of former pilots, flight attendants, ticket agents, reservation agents, and station agents for Frontier Airlines, appeal from the dismissal of their federal and state anti-trust claims, as well as state law claims for breach of contract and tortious interference with prospective business advantage or economic opportunity. Plaintiffs had alleged that defendant United Airlines had engaged in anticompetitive activity which caused Frontier to fail, thereby causing injury to plaintiffs. We affirm the dismissal of plaintiffs' claims.

BACKGROUND

Only a few facts are relevant to our disposition of this case. Frontier had competed with United in the air transportation market served by each airline's hub operations at Stapleton International Airport in Denver, Colorado. As part of its operations, United maintained a Computerized Reservation System ("CRS") known as Apollo, in which Frontier, by contract, participated. A CRS such as Apollo consists of computer terminals located in subscribing travel agents' places of business, and which permits booking and selling of tickets on various airlines. The Apollo system was available to subscribing travel agents for a fee, and it permitted booking and sales of tickets on both United and Frontier Airlines. Apollo is one of a number of CRSs.

Part of plaintiffs' antitrust allegations involve the Apollo system. Plaintiffs argue that United has monopoly power in the CRS market in Denver, and also as to its own Apollo system, and that it overcharged Frontier for its participation in the Apollo system and caused Apollo to operate unfairly in its ticket sales, to the benefit of United and the detriment of Frontier. This,

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[1] Plaintiffs in case 91-1230 are former Airline Pilots. Plaintiffs in 91-1231 are former Frontier flight attendants, ticket agents, reservation agents and station agents.

Plaintiffs allege, weakened Frontier's position in the air transportation market.

Plaintiffs' allegations also involve United's purchase of certain assets from Frontier at two different times, as well as its agreement, which was never fulfilled, to purchase Frontier's stock from Frontier's owner at the time, People Express Airlines. Plaintiffs argue that all the asset sales were distress sales made by Frontier at less than fair market value, and that United purposefully did not go through with the stock purchase agreement. They allege that the entire transaction, following the damage done to Frontier through United's manipulation of the Apollo system, left Frontier so weakened financially that it failed.

On August 24, 1986, Frontier suspended operations. Two days later it filed for bankruptcy. Plaintiffs accordingly lost their jobs. They argue that, as a result, they suffered loss of employment wages, loss of employment benefits, and loss of employment contributions. Plaintiffs assert that United's conduct amounted to a violation of sections 1 and 2 of the Sherman Act and sections 2 and 3 of the Clayton Act. They asserted state antitrust claims, as well as breach of contract claims and a claim that United had intentionally interfered with plaintiffs' prospective business advantage by diverting passengers away from Frontier to United through manipulation of the Apollo system.

United filed a motion to dismiss under Rule 12 (b)(6). After a hearing, the district court granted the motion and entered an order dismissing the action.

DISCUSSION

We review *de novo* the sufficiency of a complaint. *Avala v. Joy Mfg. Co.*, 877 F.2d 846, 847 (10th Cir. 1989). "We will uphold a dismissal [under Fed. F. Civ. P. 12(b)(6)] only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." *Jacobs,*

Visconi & Jacogs, Co. v. City of Lawrence, 927 f.2D 1111, 1115 (10th Cir. 1991)(citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). In making this determination, we must "accept all the well-plead allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *William v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). Even under this strict standard, we must affirm the dismissal of plaintiffs' action.

United argues (1) plaintiffs lack standing to pursue their federal and state antitrust claims; and (2) plaintiffs' breach of contract claims and intentional interference claims fail because they fail to allege crucial elements of each claim.

"Standing and antitrust injury are essential elements in § 4 Clayton Act damage actions." *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 652 N.14 (10th Cir. 1992); *see also Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 110 (1986); *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 u.s. 519 (1983); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 961 (10th Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 3241 (1990). While the two concepts are closely linked, they are nonetheless distinct. As we acknowledged in *City of Chanute*, "[s]tanding cannot be established without an antitrust injury, but the existence of an antitrust injury does not automatically confer standing." 955 F.2d at 652 n.14; *see also Adams v. Pan American World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987)(although former employees of defunct airline alleged antitrust injury, they were denied standing), *cert. denied*, 485 U.S. 961 (1988).

While the Supreme Court has avoided black-letter rules about antitrust standing, it has enumerated factors to be considered in evaluating standing: (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's injury-- i.e. whether it is one intended to be redressed by the

antitrust laws; (4) the directness or the indirectness of the connection between the plaintiff's injury and the market restraint resulting from the alleged antitrust violation; (5) the speculative nature of the damage sought; and (6) the risk of duplicative recoveries or complex damages apportionment. *See Cargill, Inc. v. Monform, Inc.*, 479 U.S. 104 (1987); *Associated General Contracots*, 459 U.S. 519 (1983); *Blue Shield v. McCready*, 457 U.S. 465 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *City of Chanute*, 955 F.2d at 652 n.14; *Reazin*, 899 f.2D AT 962 N. 15.[2]

Applying those factors, as well as Tenth Circuit precedent pre-dating those Supreme Court cases but incorporating similar factors, we conclude plaintiffs lack standing.

I. Antitrust Injury.

Plaintiffs rely on dicta from a single circuit court opinion, *Adams v. Pan American World Airways, Inc., supra*, for theirargument that they have alleged an antitrust injury. *Adams* is remarkably similar to this case. The *Adams* plaintiffs were former employees (pilots, flight attendants, managers, administrators, reservation agents, engineers, mechanics and shop personnel) of Laker Airways Limited. They alleged that a group of airlines, an aircraft manufacturer and the manufacturer's subsidiary conspired to drive Laker out of business, thereby

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[2] Our circuit has sometimes formulated the antitrust standing issue in terms of a two-part test: whether there was an antitrust injury -- i.e., an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); and whether the antitrust injury resulted directly from the antitrust violation. *See, City of Chanute*, 955 F.2d at 652; *Motive Parts Warehouse v. Facet Enters*, 744 F.2d 380, 389 (10th Cir. 1985); *Farnell v. Albuquerque Publishing, Co.*, 589 F.2d 497, 500 (10th Cir. 1978); *Reibert v. Atlantic Richfield, Co.* 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973). The factors enumerated in the line of Supreme Court cases cited above validate but give more specifically to the inquiry mandated by the two-part test.

depriving them of their jobs. 828 F.2d at 25. While the court concluded that plaintiffs had alleged an antitrust injury, it declined to allow plaintiffs standing, holding that the other relevant factors clearly compelled a finding of no standing.

In our view, the *Adams* court's dicta regarding antitrust injury is contrary to Tenth Circuit precedent, as well as the Supreme Court guidelines established in *Associated General Contracts* and its other antitrust standing cases. On two prior occasions, this court has addressed employee standing to assert antitrust claims arising out of some harm to the employer. In *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973), an employee sought treble damages under the Clayton Act for his loss of employment following an allegedly unlawful merger between his employer, Sinclair Oil Corporation, and Atlantic Richfield Company. At that time, this circuit reviewed antitrust standing in terms of a two-part test, which incorporates the same basic factors as the Supreme Court's subsequent multi-factor test in *Associated General Contractors* and other cases.[3] Thus, we observed that plaintiff Reibert needed to show that:

> (1) there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage; and (2) that the illegal act is linked to a plaintiff engaged in activities intended to be protected by the antitrust laws.

Reibert, 471 F.2d at 731.

We held that an employee such as Reibert met neither of those requirements. In so holding, we observed that "[s]alaried employees...are not within the area of competitive economy protected against unlawful mergers." *Id.* at 732. We further observed, "[Reibert's] termination of employment does not

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[3] *See* Note 2 *supra*.

affect the area legislatively protected. At best, appellant's discharge was no more than an outgrowth of the alleged unlawful merger...[He] is not in the area of economy endangered by a breakdown of competitive conditions." *Id.* He therefore lacked standing to sue.

This principle was followed and reiterated in *Jones v. Ford Motor Co.*, 599 F.2d 394 (10th Cir. 1979), in which we stated, "[i]t is settled law that shareholders and employees do not have standing to sue for antitrust violations that injure a corporation." *Id.* at 397. Despite plaintiffs' argument that *Reibert* and *Jones* stand only for the proposition that an employee may not sue his or her employer for antitrust violations, we perceive no limitations in clear and well-reasoned basis for the broad principle expressed in those cases, that employees simply cannot establish an *antitrust* injury when they lose their employment as a result of some allegedly anticompetitve activity directed at or involving their employer.[4]

The result of *Reibert* and *Jones* is supported and validated by the Supreme Court's analysis of the necessity of proving antitrust injury. As we have observed before:

> [O]nly *antitrust* injuries are redressable under section 4. An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows

---

[4] The *Reibert* and *Jones* cases do recognize that a different result may be reached when plaintiff-employees are in essence "quasi-businessmen operating in a market carved out by their own aggressiveness and salesmanship qualities. Thus when their employers engaged in anti-competitive practice, the employees were directly injured by these violations." *Reibert*, 471 F.2d at 730. *Reibert* similarly distinguished cases in which antitrust violations were "directly against the blackballed party," such as when a football or baseball player was preventing from obtaining employment. *Id.* at 730-31. Such is not the case here, where plaintiffs' injury is tangential to the direct injury allegedly suffered by Frontier. And, plaintiffs' efforts to characterize themselves as the direct victims of anticompetitive activity is unavailing when it is clear that the direct victim was their employer, Frontier.

> from that which makes defendant's acts unlawful." An injury which is merely causally linked in some way to an alleged antitrust violation is insufficient.

Reazin, 899 F.2d at 962 n.15 (quoting *Brunswick Corp. v. Pueblo Bowl O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *see also Associated General Contractors*, 459 U.S. at 538 ("our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market."). Plaintiffs here allege that United committed various antitrust violations which affected the CRS and the Apollo markets, as well as the "city pair" air transportation markets, in Denver. Their asserted injury, various losses stemming from their loss of employment, is tangential to any alleged harm in those markets. It may be causally linked in *some* sense to United's anticompetitive behavior in those markets, but is not necessarily the result of manifestation of a reduction in competition. It is at most an indirect consequence of the demise of an individual competitor.[5]

Accordingly, to the extent the *Adams* court's dicta stands for the bold proposition that employees of an airline allegedly driven into bankruptcy by competitors who violated the antitrust laws automatically have established an antitrust injury because of their loss of employment, we reject it as contrary to Supreme Court and Tenth Circuit precedent./

Moreover, even were we to assume plaintiffs have alleged an antitrust injury sufficient to survive a 12(b)(6) motion to dismiss, we would hold, as did the court in *Adams*, that the other factors relevant to standing doom plaintiffs' claims.

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[5] Indeed, as the *Adams* court acknowledged, the effect on airline industry employees of a reduction in the competition in that industry is unclear. That fact supports our conclusion that plaintiffs' loss of employment is not necessarily linked to the degree of competition in the industry.

II. Directness or Indirectness of Injury.

The *Adams* court correctly held that any injury plaintiffs suffered in that case was indirect. The court observed:

> The conspirators allegedly forced Laker to its knees. Whenever that happens to a firm, the web of contracts and relationship which from the essence of the firm will be dismantled. Astute counsel should not be able, merely by feats of characterization, to confer standing on all participants in that web.
>
> However the final dismissal may be labelled, the harm to plaintiffs is one step removed from the harm to Laker.

Adams, 828 F.2d at 28. After surveying the case law, the court concluded "the cases provide no support for suit by employees of a firm victimized by antitrust violations." *Id.* at 29.[6]

We agree with the *Adams*' court's analysis. Furthermore, it is completely consistent with *Reibert* and *Jones* from this circuit. Indeed, in *Jones*, we specifically stated:

> While Section 4 of the Clayton Act was worded broadly to effect Congress' intentions to encourage sanction against antitrust violations wherever possible, the right of action is limited to those directly injured by the anti-competitive behavior. Thus, even though there are losses of a job with a corporation and upon an investment in stock this is not regarding the direct injury against which the treble damages action was aimed.

599 F.2d at 397 (citation omitted). *See also Reibert*, 471 F.2d at 731 ("If there is any antitrust violation, it is directed toward

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[6] Furthermore, the *Adams* court observed "superior plaintiffs clearly exist--both Laker itself and consumers of transatlantic air transportation." 828 F.2d at 29. That is equally true in this case.

the petroleum industry...The first element, causal connection between violation and injury, is lacking because [Reibert] cannot show that any antitrust violations directly injured him.").

Similarly, plaintiffs injuries here are at most indirect. Plaintiffs' mere *assertion* that they are the direct victims of United's anticompetitive scheme is insufficient to convince us otherwise. *See Air Courier Conference of America v. American Postal Workers Union,* 111 S. Ct. 913, 920 N.5 (1991)("Employees have generally been denied standing to enforce competition laws because they lack competitive and direct injury.")' *Associated General Contractors,* 459 U.S. at 541 (in denying union standing to argue that multiemployer association and its member coerced third parties and some association members to enter into business relationships with non-union firms, thereby restraining union's business activities, the Court observed "a number of decision have denied standing to employees with merely derivative injuries.").

Were we to permit standing in this case, there would be no principled way to cut off a myriad of other indirect claimants, such as suppliers of Frontier Airlines or creditors, each of whom could claim that their business was somehow impacted or adversely affected by Frontier's demise.

III. Speculativeness of Damages.

The *Adams* court similarly rejected plaintiffs' arguments in favor of standing on the additional ground that their damages were speculative. Not only is it uncertain what effect on plaintiffs' wages and reduction in the number of airlines would have, plaintiffs' economic fate is specifically tied to their own employer-airline.

> [W]e cannot assume [an airline's] indefinite survival in an exceptionally volatile industry characterized by frequent mergers and bankruptcies. Further, the prosperity of each of the ... plaintiffs would depend

> on how long he or she would have remained with [the airline], with what advancement, what salary increases, etc. Finally, the court would need to consider each plaintiff's prospects of obtaining comparable employment in aviation or other industries.

Adams, 828 F.2d at 30 (citation omitted). That analysis applies with equal force in this case. Plaintiffs attempt to circumvent those difficulties by asserting that Frontier has a ten-year history of profitable performance from which to somehow measure their damages. That in no way diminishes the difficulty of trying to calculate *plaintiffs'* damages.

IV. Duplicative Damages.

Finally, it is clear that here, as in *Adams*, there is a risk of duplicative recoveries or the necessity of apportioning damages if plaintiffs are allowed standing. *See Associate General Contractors*, 459 U.S. at 544-45; *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31, 735-48 (1977); *Adams*, 828 F.2d at 30-31.

V. State Law Claims.

Plaintiffs argue that, despite dismissal of their complaint for lack of standing under the federal antitrust laws, we should nonetheless permit their state law antitrust claims and their other state law claims to go forward. The district court held that the same standing analysis applied to plaintiffs' state antitrust claims, and directed dismissal of those claims. It further held that:

> [T]he plaintiffs are not beneficiaries of the two contracts that are involved, and ... the doctrine of interference with prospective business advantage or economic opportunity is not applicable to employees but is limited to those who are in business in the more traditional sense of being entrepreneurs.

Appendix to Appellants' Consolidated Opening Brief at 144. Plaintiffs cursory arguments do not convince us that the district court erred. We therefore affirm those conclusions.

For the foregoing reasons, we AFFIRM the district court's dismissal of plaintiffs' action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

B1

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-M-1507

CAREY F. SHARP, et al.,

Plaintiff(s),

v.

UNITED AIR LINES, INC.

Defendant(s).

ORDER OF DISMISSAL

For the reasons stated at the conclusion of oral argument held today, it is

ORDERED that this civil action is dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure because Plaintiffs have failed to allege caims upon which relief can be granted.

Dated: May 22, 1991

BY THE COURT:

/s/_____

Richard P. Matsch, Judge

FILED
OCT 16 1992
OFFICE OF THE CLERK

(2)

No. 92-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CAREY F. SHARP, *et al.*

Petitioners,

v.

UNITED AIRLINES, INC., and
DOES 1 THROUGH 10,

Respondents.

Consolidated with
NINA M. ABBOTT, *et al.*

Petitioners,

v.

UNITED AIRLINES, INC., a Delaware Corporation,
and JOHN DOES 1 through 25

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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October 15, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Do the former employees of a defunct airline have antitrust standing to recover treble damages under the Clayton Act for lost wages and benefits stemming from their employer's business failure which, in turn, was assertedly caused by the Respondent's unlawful monopolization of the air transportation markets in which it and the employer competed?

2. Did the District Court apply Colorado law correctly in dismissing Petitioners' state antitrust claims for lack of antitrust standing?

3. Did the District Court apply Colorado law correctly in dismissing Petitioners' tortious interference and third-party contract claims because they failed to state a cognizable claim?

RULE 29.1 STATEMENT

The parent company of United Airlines, Inc. is UAL Corporation. Except for wholly owned subsidiaries, there are no subsidiaries of United Airlines, Inc.

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No. 92-474

IN THE

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OCTOBER TERM, 1992

CAREY F. SHARP, *et al.*

Petitioners,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners in these two consolidated cases are former pilots, flight attendants, ticket agents, reservation agents and station agents of Frontier Airlines, Inc.[1] Frontier suspended operations and filed for bankruptcy in August 1986. By this action the former employees seek to hold Respondent United Airlines responsible for their loss of employment which resulted from Frontier's demise.

To that end, in August, 1990, they filed a complaint in the United States District Court for the District of Colorado naming United as the only defendant. Alleging that Frontier's failure was the result of various violations of the federal antitrust laws directed against it by United, Petitioners sought treble damages under the Clayton Act[2] for wages and other employee benefits lost as a result of the discontinuance of their Frontier employment.

Petitioners' complaint additionally included a number of state-law causes of action. The first was an antitrust claim, identical to their federal claim, asserted under the Colorado Restraint of Trade and Unfair Practices statutes.[3] A second was a common law tort claim charging that United had diverted passengers from Frontier and had thereby tortiously interfered with Petitioners' prospective economic advantage. Finally, as asserted beneficiaries of unrelated contracts between, respectively, United and Frontier and United and Frontier's corporate parent, People Express, Petitioners sought to pursue separate claims for United's alleged breach of each agreement.

On May 22, 1991 the District Court entered its order granting United's motion brought pursuant to Fed. R. Civ.

[1] The plaintiffs in *Sharp* are 342 former Frontier pilots. The plaintiffs in *Abbott* are 272 other former Frontier employees. The *Sharp* and *Abbott* plaintiffs are proceeding with this petition on a consolidated basis because their appeals below were consolidated by order of the Tenth Circuit Court of Appeals. (Order, July 12, 1991.) Because the *Sharp* Complaint and the *Abbott* Amended Complaint are substantively identical, they are herein treated as a single complaint.

[2] Clayton Act § 4, 15 U.S.C. § 15 (1988).

[3] Colo. Rev. Stat. §§ 6-2-108, 6-4-101.

P. 12(b)(6) for failure to state a claim.[4] The District Court ruled that Petitioners lacked antitrust standing under both federal and state antitrust law to recover for the derivative damage they suffered on account of the alleged antitrust injury visited on their employer. (Rec. 144.)[5] The Court further ruled that Petitioners' tortious interference cause of action failed to state a claim under Colorado common law because the affected economic relationship was between the allegedly diverted passengers and Frontier and not between such passengers and Petitioners. *Id.* Finally, the District Court dismissed the breach of contract claims because Petitioners' allegations failed to establish a basis for according them third-party enforcement status under Colorado common law. *Id.*

Without moving the District Court for leave to amend their pleading, Petitioners filed a timely appeal to the United States Court of Appeals for the Tenth Circuit. Reviewing the sufficiency of the complaint *de novo*, the Court of Appeals on June 17, 1992 issued its opinion affirming "the district court's dismissal of plaintiffs' action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim." (App. A at 20, 967 F.2d 404, 410.)[6] The present Petition seeks review of that ruling.

STATEMENT OF FACTS

Petitioners' Complaint alleges that prior to August 24, 1986, they were pilots and other employees of Frontier Air-

[4] The District Court's order is reproduced in Petitioners' Appendix at p. B1.

[5] The District Court delivered an oral opinion explaining its ruling which is reported as part of the transcript of proceedings on Respondent's motion. The record on appeal is contained in the Appendix to Appellant's Consolidated Opening Brief which was filed with the Court of Appeals. Citations in this brief to the record on appeal are to that Appendix as paginated below and are indicated by the reference "Rec." The District Court's oral opinion begins at Rec. 137.

[6] Appendix A to the Petition is represented as a reprint of the opinion of the Court below. It is, however, replete with typographic and other errors which tend to impair its reliability. This brief accordingly provides joint citations to Petitioners' Appendix ("App. A") and to the Federal Reporter. The latter reports the Court of Appeals decision as *Sharp v. United Airlines, Inc.*, 967 F.2d 404 (10th Cir. 1992).

lines, Inc. (Complaint ¶ 1, Rec. 3, 28.) On that date, Frontier suspended operations; two days later it filed for bankruptcy. (Complaint ¶¶ 1, 53, Rec. 3, 14, 28, 38.) As a result, petitioners lost their jobs. (Complaint ¶ 57, Rec. 14, 38.)

Prior to Frontier's suspension of operations, it competed with United in the air transportation market between various city-pairs served by each carrier as part of its respective hub operations at Denver's Stapleton International Airport. (Complaint ¶ 7, Rec. 4, 28.) In addition to that competitive relationship, Frontier was a contract participant in United's Computerized Reservation System ("CRS") known as Apollo. (Complaint ¶¶ 13, 32, Rec. 5, 9, 30, 34.)

Apollo is one of a number of competing systems each of which in its essential consists of a computer terminal located at a subscribing travel agent's place of business. The terminal provides flight, fare and seat availability information via computer display while simultaneously enabling the agent to effect customer booking and ticketing via direct computer input. (Complaint ¶¶ 11, 12, 15, Rec. 5, 6, 29-30.) Apollo-equipped agents were able to use that system to book and sell tickets on various airlines, including both Frontier and United. (Complaint ¶ 13, Rec. 5, 30.) United made Apollo available to subscribing travel agents for a fee. (Complaint ¶ 15, Rec. 6, 30.)

Petitioners' antitrust charges embrace a number of distinct United activities. First, United is alleged to have an illegal monopoly as to its own Apollo CRS and, in the Denver area, as to CRS's generally. (Complaint ¶ 17, Rec. 6, 31.) Pursuant to such monopoly power, United is asserted to have both overcharged Frontier for its participation in Apollo and caused Apollo to operate in a manner which unfairly disadvantaged the sale of Frontier tickets relative to those of United. (Complaint ¶¶ 21, 27, 37, 46, Rec. 7, 8, 10-11, 12, 32, 33, 35, 36-37.) While Frontier is not alleged to have competed with United in the CRS market, United's CRS-related conduct is asserted to have weakened Frontier's competitive position in the air transportation market where it

purportedly suffered higher costs and reduced revenues. (Complaint ¶¶ 45, 46, Rec. 12, 36.)

A second cluster of conduct challenged by petitioners' antitrust claims concerns United's purchases of certain Frontier assets in early 1985 and July 1986, respectively. (Complaint ¶¶ 47, 51, Rec. 12, 13, 37.) Petitioners contend that these transactions represented distress sales made by Frontier at less than fair value. (Complaint ¶¶ 47, 52, Rec. 12, 13, 37-38.) The sales are alleged to have been precipitated by Frontier's need to shore up a financial condition which had assertedly been weakened by United's CRS activities. (Complaint ¶¶ 47, 53, Rec. 12, 13, 37, 38.)

United is additionally alleged to have entered a July 10, 1986 contract with Frontier's then corporate owner (People Express Airlines) in bad faith. (Complaint ¶ 50, Rec. 13, 37.) Contingent on certain conditions being timely met, the contract called for United to purchase from People Express all of Frontier's outstanding stock. In addition, prior to the stock purchase closing, the contract permitted United to purchase certain stated Frontier assets (two Stapleton Airport hangars and a total of thirteen landing slots at three airports) at specified prices. (Complaint ¶ 51, Rec. 13, 37.) While United proceeded with the asset purchase,[7] the conditions to the stock purchase agreement were ultimately not met and that transaction accordingly never closed. (Complaint ¶¶ 50, 53, Rec. 13, 37, 38.) The totality of this transaction is alleged to have left Frontier in such a weakened financial condition that it soon failed. (¶¶ Complaint 53, Rec. 13, 38.)

Petitioners alleged that both United's CRS activities and its asset acquisition activities were undertaken with the specific intent of achieving a monopoly in the city-pair air transportation markets in which it competed with Frontier. (Complaint 56, Rec. 14, 38.) Petitioners further alleged that United's conduct and success in driving Frontier from the Denver city-pair air transportation markets constituted a

[7] This is the same July 1986 asset purchase referred to in the previous paragraph. *See* p. 5, *supra*.

violation of Sections 1 and 2 of the Sherman Act[8] and Sections 2 and 3 of the Clayton Act.[9] (Complaint ¶¶ 56, 60, 64, 68, 72, 99, 103, Rec. 14, 15, 16, 20-21, 38, 39, 41, 45, 46.) Finally, Petitioners alleged that as a consequence of Frontier's failure they suffered "loss of employment wages, loss of employment benefits, and loss of employment contributions" as to which they sought treble recovery under the federal and Colorado antitrust laws. (Complaint ¶¶ 57, 61, 65, 69, 73, 100, 104, Rec. 14-15, 16-17, 21-22, 38, 39-40, 41, 45, 46.)

In addition to these various antitrust claims, Petitioners alleged that United breached a contract with Frontier whereby it had accorded the latter a preferred participation status in United's Apollo CRS. (Complaint ¶ 87, Rec. 19, 43.) Similarly, Petitioners alleged that United breached the 1986 stock purchase agreement with People Express. (Complaint ¶ 114, Rec. 23, 47-48.) While not claiming to be a primary party to either contract, Petitioners claimed third-party beneficiary enforcement status alleging that faithful performance by United would have preserved Frontier and derivatively benefited its employees. (Complaint ¶¶ 89, 115, Rec. 19, 23, 43-44, 48.)

Finally, Petitioners' complaint asserted that United had manipulated its CRS system so as to divert passengers from Frontier to United, and that such conduct constituted an interference with Petitioners' prospective economic advantage. (Complaint ¶ 91, Rec. 19, 44.)

REASONS FOR DENYING THE WRIT

The only question of federal law presented by the Petition concerns the antitrust standing of an employee to recover job-loss related damages from her failed employer's competitor where the latter has assertedly monopolized the market in which it and the failed employer competed. That issue is governed by this Court's multi-part test articulated in *Associated General Contractors, Inc. v. California*

[8]Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1988).

[9]Clayton Act §§ 2, 3, 15 U.S.C. §§ 13, 14 (1988).

State Council of Carpenters, 459 U.S. 519 (1983). Both the District Court and the Court of Appeals applied that test faithfully in dismissing Petitioners' claim.[10] Moreover, every circuit court which has had occasion to consider the question has likewise concluded that employees lack antitrust standing for such derivative injury.[11] Lastly, the issues of state law raised by Petitioners offer neither special nor important reasons to invoke this Court's discretionary power of review.[12]

I. THE COURT BELOW CORRECTLY APPLIED THIS COURT'S GOVERNING TEST FOR ANTITRUST STANDING

As directed by this Court's opinion in *Associated General Contractors*, the Court below determined Petitioners' antitrust standing pursuant to an evaluation of "the Plaintiffs' harm, the alleged wrongdoing by the Defendants, and the relationship between them." 459 U.S. at 534. In doing so, it accepted "all the well-pleaded allegations of the complaint as true" and construed them "in the light most favorable" to Petitioners. (App. A at 12, 967 F.2d at 406.)[13] As so construed, it proceeded to measure Petitioners' allegations by each of the factors articulated in this Court's *Associated General Contractors*' multi-part test for antitrust standing.

Like the labor unions denied standing in that case, Petitioners were neither participants nor consumers in the markets at which the purported antitrust violations were direct-

[10] *See* discussion at pp. 7-9, *infra*.

[11] *See* discussion at pp. 9-11, *infra*.

[12] *See* discussion at pp. 11-14, *infra*.

[13] The Petition for Writ of Certiorari is replete with references to legal conclusions which by Petitioners' contention entitle them to proceed to trial without regard to whether they are supported by or consistent with the complaint's factual allegations. *See, e.g.*, Petition at 2, 3, 4, 7-9, n.11, n.12, n.13, n.14, 11-12, 14, 16, n.29. While the Court of Appeals fully credited Petitioners' factual allegations, it no more than this Court is compelled to accept mere legal conclusions. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57 (1938).

ed.[14] Those markets were air transportation markets, not the labor markets in which Petitioners participated. As the Court below observed, Petitioners did not suffer injury of the type " 'that flows from that which makes defendant's acts unlawful.' " (App. A at 15-16, 967 F.2d at 408 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).) It was their employer and not Petitioners who suffered any breakdown in competitive conditions in the air transportation market. (App. A at 16, 967 F.2d at 408.)[15] Indeed, as the Court of Appeals pointed out, "the effect on airline industry employees of a reduction in competition in that industry is unclear." (App. A at 16 n.5, 967 F.2d at 408 n.5.)[16] Thus, while Petitioners' loss of employment with Frontier may be casually linked to the defendant's alleged antitrust violations, it is merely "tangential" to any competitive harm in the affected air transportation markets and does not itself constitute antitrust injury. (App. A at 16, 967 F.2d at 408.)[17]

In addition, again like the labor union's injury in *Associated General Contractors*, Petitioners' damage is indirect, being merely derivative of the injury assertedly suffered by Frontier. (App. A at 17-18, 967 F.2d at 408-09.)[18] There are accordingly other parties better situated to vindi-

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[14]There is no basis for Petitioners' reliance on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Its inapplicability to claims of the nature here in issue was expressly discussed in this Court's *Associated General Contractors* opinion. It was there pointed out that "McCready alleged that she was a consumer of psychotherapeutic services and that she had been injured by the defendants' conspiracy to restrain competition in the market for such services." *Associated General Contractors*, 459 U.S. at 538. By contrast, the labor union in *Associated General Contractors*, like Petitioners here, enjoyed no such status: "In this case, [unlike *McCready*] however, the Union was neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539. On the basis of that distinction, this Court denied the Union antitrust standing. *Id.* at 538-40. The distinction is equally applicable to Petitioners and necessarily renders *McCready* irrelevant here.

[15]Compare *Associated General Contractors*, 459 U.S. at 541.

[16]Compare *Associated General Contractors*, 459 U.S. at 539.

[17]Compare *Associated General Contractors*, 459 U.S. at 540-541.

[18]Compare *Associated General Contractors*, 459 U.S. at 541.

cate any meritorious antitrust claim embraced by Petitioners' allegations. (App. A at 17 n.6, 967 F.2d at 409 n.6.)[19]

Petitioners' damage claims, moreover, are highly speculative. Each individual claim would depend on the employment tenure the particular employee would otherwise have enjoyed with Frontier—with what advancement, with what salary, and with what mitigating alternative opportunities. (App. A at 18-19, 967 F.2d at 409-10.)[20] And lastly, Petitioners' claims present clear potential for duplicative recovery. (App. A at 19, 967 F.2d at 410.) Indeed, this Court has itself pointed out the difficulty a District Court would face in identifying and apportioning damages among "directly victimized" employers and "indirectly affected employees." *Associated General Contractors*, 459 U.S. at 545.

As is thus apparent, the decision below represents nothing more than a straightforward application of this Court's established multi-factor test for antitrust standing. The Court of Appeals' manifestly correct application of that test demonstrates clearly that Petitioners lack standing to prosecute the federal antitrust violations asserted in their complaint. There is accordingly no occasion for the intervention of this Court.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS

Petitioners do not contend, nor could they, that there is a conflict among the circuits on the issue of whether employees have antitrust standing to recover derivative damages resulting from antitrust violations visited on their employer. On the contrary, every Court of Appeals that has considered the issue has denied such standing. *See Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n,*

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[19]Compare *Associated General Contractors*, 459 U.S. at 541-542. Indeed, such claims have been brought by various other airlines and have been determined to be without merit. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1603 (1992).

[20]Compare *Associated General Contractors*, 459 U.S. at 542-543.

830 F.2d 1374, 1378 (7th Cir. 1987); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 31 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 543 (9th Cir. 1987); *Province v. Cleveland Press Publishing Co.*, 787 F.2d 1047, 1050-54 (6th Cir. 1986); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710-11 (11th Cir. 1984); *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir.), *cert. denied*, 459 U.S. 1090 (1982); *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 96-97 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976).[21] Indeed, this Court has itself observed that "[e]mployees have generally been denied standing to enforce competition laws because they lack competitive and direct injury." *Air Courier Conference v. American Postal Workers Union*, ___ U.S. ___, 111 S. Ct. 913, 920 n.5 (1991).

Unable to assert a conflict on the decided issue of antitrust standing, Petitioners rely on dictum in *Adams*[22] to conjure disagreement on the subsidiary issue of antitrust injury. While the *Adams* court and the Court below reached the common conclusion that employees in Petitioners' situation lack antitrust standing, they disagreed as to the procedure appropriate for determination of a single component of the *Associated General Contractors* multi-factor test.

Dictum in *Adams* suggests that a trial is necessary to permit a determination of whether or not terminated employees of a defunct airline suffered antitrust injury. *See Adams v. Pan Am. World Airways, Inc.*, 828 F.2d at

[21] There are two situations, neither of which is implicated here, in which employees have been accorded antitrust standing. One is where the antitrust restraint is directed at the labor market itself. *See Radovich v. National Football League*, 352 U.S. 445 (1957); *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967). The other concerns contract commission agents who sell their principals' wares in the economic markets in which competition is restrained. *See, e.g., Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942). The court below recognized both these exceptions but quite correctly distinguished them from the derivative-injury claim presented by the instant complaint. (App. A at 15 n.4, 967 F.2d 404, 408 n.4.)

[22] *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

27.[23] In the view of the Court below, however, that determination is in the present circumstances resolved as a matter of law by this Court's decision in *Associated General Contractors*. (App. A at 14, 967 F.2d at 407-08.)[24] But this minor difference played no controlling role in the conclusion of either Circuit Court: the *Adams* court denied antitrust standing as a matter of law despite its antitrust–injury dictum,[25] while the Court below made plain that "even were we to assume antitrust injury, . . . we would hold, as did the Court in *Adams*, that the other factors relevant to standing doom plaintiffs' claims." Compare App. A at 16, 967 F.2d 404, 408, with *Adams*, 828 F.2d 24, 25-6.

Given the broad and unanimous Circuit Court view on the standing issue actually decided, such a limited difference on a subordinate matter expressed only in dicta hardly warrants the intervention of this Court.

III. THE STATE LAW ISSUES RAISED BY PETITIONERS OFFER NEITHER THE SPECIAL NOR IMPORTANT REASONS NECESSARY TO INVOKE THIS COURT'S REVIEW

This Court has long recognized that the ultimate responsibility for determining state law resides not with it but

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[23] Such a trial would evaluate whether an enhanced level of industry competition would have raised output in such a manner as to result in higher wages, or whether it would have brought on increased pressure to cut costs by reducing wages. 828 F.2d at 27. Such an approach is not only wholly unworkable, but it is in direct conflict with this Court's analysis of antitrust injury as explicated in *Associated General Contractors*. *See* 459 U.S. at 539.

[24] *See also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

[25] Antitrust injury is but one component of antitrust standing: "A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons. . . . Thus, in *Associated General Contractors* we considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under § 4." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986).

with the highest court of the state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Accordingly, where reasonable arguments have been advanced to support a determination of state law made by a federal court of appeals, this Court has found it "wholly unprofitable for us to analyze [the state] cases on the point." *Estate of Spiegel v. Commissioner of Internal Revenue*, 335 U.S. 701, 708 (1949). It has for that reason become the policy of the Court to "accept and therefore . . . not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Indeed, as Rule 10.1 of the Rules of this Court admonishes, discretionary review should be granted only for "special and important reasons," and that is doubly so where the controlling questions are of local law.

A. There Is No Basis for Review of Petitioners' State Antitrust Claims.

Petitioners' state antitrust claims are based on the same factual allegations and the same alleged injury as their federal antitrust claims. (Complaint ¶¶ 74, 77, 78, 81, 82, 85, 105, 108, 109, 112, Rec. 17, 18, 22, 23, 41-42, 43, 46-47.) The Colorado Supreme Court has expressly recognized that there is a "substantial similarity in text and purpose present in the federal and state antitrust statutes." *People v. North Ave. Furniture & Appliance*, 645 P.2d 1291, 1295 (Colo. 1982). It has accordingly held that federal antitrust precedent is entitled to "careful scrutiny" in resolving state antitrust questions. *People ex rel. Woodward v. Colorado Springs Bd. of Realtors*, 692 P.2d 1055, 1061 (Colo. 1984). In the absence of Colorado decisional law treating of employee antitrust standing, it is entirely consistent with such direction for a federal court to apply the same test of state antitrust standing as it uses to determine federal standing. *See Winther v. DEC Int'l, Inc.*, 625 F.Supp. 100, 104 (D. Colo. 1985). That was the altogether correct conclusion of the Court below. (App. A at 19-20, 967 F.2d at 410.)

B. There Is No Basis for Review of Petitioners' State Common Law Claims.

Petitioners' contract claims derive from United's alleged breach of its 1982 CRS contract with Frontier and its July 1986 stock purchase agreement with People Express. (Complaint ¶¶ 87 and 114, Rec. 19, 23, 43, 47-48.) Colorado law does not accord contract-enforcement status to third-party beneficiaries unless the primary contracting parties affirmatively intended to so bestow the particular benefit resulting from their agreement; it is not enough that the benefit arises as a mere incident of a separate purpose. *E.B. Roberts Construction Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo. 1985); *Summerhouse Condominium Ass'n., Inc. v. Majestic Sav. & Loan Ass'n*, 615 P. 2d 71, 73 (Colo. Ct. App. 1980).

According to the complaint, the CRS agreement provided the terms and conditions under which Frontier's flights would be displayed on the Apollo CRS system. (Complaint ¶¶ 24-25 and 32-34, Rec. 7-8, 9-10, 32, 34.) The contract allegations contained in the Complaint make no mention of Frontier's employees, nor of *any* intention on the part of United or Frontier to benefit such employees. Nor would such allegations be credible if made. The CRS agreement was quite obviously for the benefit of Frontier. Its employees received, at most, only an incidental benefit from the additional business generated by Frontier's participation in the Apollo system.

Petitioners' claim to enforcement status with respect to the 1986 stock purchase agreement is even more strained. In 1986 People Express owned the stock of Frontier. United contracted with People Express to buy the stock under specified terms and conditions. (Complaint ¶ 50, Rec. 13, 37.) Any purported obligation to purchase the stock was necessarily owed to People Express. Absent some allegation of a special purpose—and there is none—there is no basis for according intended beneficiary status even to Frontier, much less to

Frontier's employees who enjoyed no relationship whatever with either of the contracting parties.[26]

Petitioners' tortious interference claim asserted that United diverted "passengers from Frontier through the Apollo mechanism." (Complaint ¶ 91, Apx. Rec. 19, 44.) Colorado follows the Restatement (Second) of Torts with respect to tortious interference, including interference with prospective business advantage. *See Dolton v. Capitol Fed. Sav. & Loan Ass'n*, 642 P.2d 21, 23 (Colo. Ct. App. 1981). Under the Restatement (Second) section 766B, a party is liable for "intentionally and improperly" interfering "with another's prospective contractual relation" if the party induces or otherwise causes a third person not to enter into or continue the prospective relation, or prevents the other from acquiring or continuing the prospective relation.

Petitioners do not allege interference with any prospective business relationship of their own. As employees of Frontier, they could not have contracted in their own right to provide air travel services to the allegedly diverted passengers—only Frontier could have so contracted. They accordingly had no personal prospect of any future business relationship with which United's alleged conduct could have interfered.

The Court below affirmed the district court's dismissal of Petitioners' various common law claims because "[p]laintiffs' cursory arguments do not convince us that the district court erred." (App. A at 20, 967 F.2d at 410.) Petitioners' cursory arguments below have all but disappeared completely in their petition to this Court. There is accordingly no basis for invocation of this Court's review.

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[26] Petitioners' argument that Respondent's motion should have been "treated as one for summary judgment" is inexplicable. Respondent presented no extraneous materials in support of its motion and none were relied on by the District Court. (Rec. 55, 59, 137.) Moreover, Petitioners never raised this objection in either the District or Circuit Court. They may not do so for the first time here. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to deny the instant petition for grant of a writ of certiorari.

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